
Enclosure**ERITREA-ETHIOPIA BOUNDARY COMMISSION****STATEMENT BY THE COMMISSION**

1. This Statement is issued by the Eritrea-Ethiopia Boundary Commission (“the Commission”) following its meeting in private session in The Hague on 20 November 2006 to consider the further procedures to be followed in connection with the demarcation of the boundary between Eritrea and Ethiopia. Invitations to the Parties were issued by e-mail on 8 November 2006. Both Parties declined the Commission’s invitation. Part of the meeting was attended by representatives of the following Witnesses to the Algiers Agreement of 12 December 2000: the Secretary-General of the United Nations, the European Union, the United States of America and the People’s Democratic Republic of Algeria.
2. By the Algiers Agreement, the Parties established the Commission to delimit and demarcate the border between them on the basis of the pertinent colonial treaties and applicable international law. The Parties stipulated that “the delimitation and demarcation determinations of the Commission shall be final and binding” and agreed that “each Party shall respect the border so determined, as well as the territorial integrity and sovereignty of the other Party”.
3. The Parties evidently considered the completion of the task of delimitation as urgent, because they provided in Article 4(12) of the Agreement that the delimitation should be completed within six months of the first meeting of the Commission. The Commission recognised that a similar sense of urgency attached to the demarcation process; Article 4(13) of the Algiers Agreement called upon the Commission to arrange for “expeditious demarcation”. The terms of the Algiers Agreement, and its object and purpose, preclude leaving the boundary undemarcated for a prolonged period or indefinitely.¹
4. The constitution of the Commission was completed on 20 February 2001 and the Commission immediately entered upon its task. After the receipt and study of substantial written pleadings, and having heard the oral arguments of the Parties, the Commission delivered the Delimitation Decision of 13 April 2002. This identified the principal features of the boundary line, accompanied by a list of coordinates identifying the points through which the boundary runs. When the Delimitation Decision was rendered, both Parties promptly announced their acceptance of it. Thereupon, the Commission undertook the steps necessary to initiate the process of demarcation.

¹ The Commission recalls the observation of the Court of Arbitration in the *Beagle Channel* case – albeit in a somewhat different context: “It is not admissible that, because of the total non-cooperation of one of the Parties, contrary to its obligation under a valid Award, the Court should be compelled to remain indefinitely in existence in a state of suspended animation”. (See 52 *International Law Reports* 284.) The present case is not one involving the total non-cooperation of one Party, but rather the non-cooperation of both Parties, though in differing ways and degrees. Thus, the observation of the *Beagle Channel* tribunal applies *a fortiori*.

5. On 8 July 2002, in accordance with Article 30(1) of its Rules of Procedure, the Commission promulgated the Demarcation Directions. These were revised in November 2002 and in March and July 2003. In implementation of their obligations under these Directions, the Parties appointed Liaison Representatives and Field Liaison Officers to facilitate the participation by each Party in identifying sites for the emplacement of boundary pillars. The Commission established its Field Offices in Asmara and Addis Ababa in November 2001 and in Adigrat in July 2002. It also appointed a Chief Surveyor in October 2001 and a Special Consultant in May 2002 to provide technical advice and assistance to the Commission. The Chief Surveyor took up residence in Asmara on 15 November 2001. Surveying staff were recruited to assist him.
6. Initially, it was envisaged by the Commission, as reflected in the Demarcation Directions of 8 July 2002, that the task of demarcation would entail the emplacement of pillars as markers of the line of the boundary specified in the Delimitation Decision. On this basis, the Demarcation Instructions were issued on 21 March and 22 August 2003. Steps were taken towards the negotiation of contracts for the construction and emplacement of pillars.
7. On 24 January 2003, in response to a request by the Commission for comments on the draft 1:25,000 maps, Ethiopia filed a memorandum setting out at length its views on the process of demarcation. It emphasised the necessity of conducting the demarcation in a manner that takes into consideration the human and physical geography through the study of the facts on the ground.² It contended that, in the process of demarcation, alterations or adjustments of the delimited boundary should be made so as principally to eliminate those situations in which villages were divided or roads were cut by the boundary. The Commission later ruled that most of these contentions were inadmissible. Eritrea, for its part, insisted that the line described in the Delimitation Decision should be applied without any change. In paragraph 20 of the "Observations" which the Commission conveyed to the Parties on 21 March 2003, the Commission stated its view that, in the absence of express authorisation by the Parties, it lacked the authority to vary the delimited boundary line except in cases of "manifest impracticability". It also indicated that the description of certain parts of the boundary in the Dispositif of the Delimitation Decision would need to be completed when, as foreseen in that Decision, the Commission had received necessary information from the Special Consultant and the Chief Surveyor, in particular in relation to Tserona, Zalambessa and Bure.
8. On the basis of the colonial treaties, the application of which was prescribed in the Algiers Agreement, the demarcation of the boundary was approached in three sectors (Western, Central and Eastern), as had been the delimitation. Demarcation began in the Eastern Sector in March 2003 and the location of pillars was established through field assessment with the cooperation of both Parties by August 2003. A set of marked maps showing proposed boundary pillar sites in this Sector was sent to the Parties for comment. Eritrea accepted these

² Submission by the Federal Democratic Republic of Ethiopia, 24 January 2003, Comments Pursuant to the December 2000 Agreement, the Commission's Rules of Procedure, the Commission's Demarcation Directions and Instructions provided at the Boundary Commission's Meeting on 6 and 7 November 2002, p. 61-74.

marked maps of the Eastern Sector but Ethiopia did not respond. As the failure of a Party to participate could not prevent the Commission from performing its function, after the expiry of the period which the Commission gave to the Parties for comment on these maps the Commission adopted specific boundary points that could serve as locations for the emplacement of pillars in that Sector. These locations extended from the Djibouti border in the east to the Salt Lake in the north-west. Some of these locations departed from the boundary line as prescribed in the Delimitation Decision. The possibility of such variation was foreseen in the 1908 Treaty relating to the Eastern Sector (alone among the three treaties with such a permissive provision) and was necessary in view of the exceptional nature of the terrain. Despite these variations, each Party still ended up in effect with the same amount of territory as had been awarded to it by the Delimitation Decision.

9. The Commission encountered difficulties that were posed by the Parties when it was about to commence demarcation in the Central and Western Sectors. Although Ethiopia agreed that the Commission could continue with pillar emplacement in the Eastern Sector, it was not prepared to allow demarcation to begin in the Central and Western Sectors. Eritrea would not agree to pillar emplacement in the Eastern Sector unless demarcation work was begun simultaneously in the Central and Western Sectors.
10. More particularly, the obstacles from the Ethiopian side took various forms: prohibiting field-work within the territory under its control, thus impeding the survey of ground control points for the aerial photography and the secondary datum survey (April to July 2002); filing extensive comments on the Delimitation Decision, amounting to an attempt to reopen elements of the substance of that Decision, instead of limiting itself to the requested comments on the draft 1:25,000 maps (January 2003); alleging that the Field Liaison Officers appointed by Eritrea were intelligence officers and refusing to allow field work to continue in Ethiopian territory, then failing to appoint ad hoc Field Liaison Officers within the prescribed time limit following the Commission's Order of 9 February 2003 so as to allow field work to resume without further delay (January to February 2003); failing to appoint new Field Liaison Officers for the remaining demarcation activities following the Commission's Decision pursuant to Article 15B of the Demarcation Directions (July 2003 to March 2006); failing to provide assurances for the security of all demarcation personnel (August 2003 to the present); failing to comment on maps which indicated the pillar locations in the Eastern Sector (September 2003); repeatedly refusing to authorise necessary flight requests lodged by the Chief Surveyor; eventually limiting the Commission's field work to the Eastern Sector by statements that the ad hoc Field Liaison Officers would only be permitted to operate in the Eastern Sector; complaining to the Secretary-General of the United Nations of what Ethiopia termed "illegal, unjust and irresponsible decisions" of the Commission in respect of Badme and parts of the Central Sector, and proposing that the Security Council set up an alternative mechanism to demarcate the parts of the boundary it contested (September 2003); denouncing in that same letter the Commission's Delimitation Decision by stating that it would only recognise the southern boundary of the Temporary Security Zone ("TSZ") as the international boundary; failing to provide assurances for the security of the contractors selected for the emplacement and as-built survey of the boundary pillars (September to October 2003); rejecting the

Commission's invitation to attend a meeting on 5 November 2003, claiming that the notice was too short and that there was no likelihood of anything being achieved (October 2003); refusing to permit any work to be carried out by the Commission's field staff in the Western and Central Sectors until the boundary in the Eastern Sector had been demarcated and subject to Ethiopia's approval of the Commission's method of demarcation (November 2003); failing to make prompt payment of its share of the Commission's expenses (February 2004 to February 2005); rejecting the Commission's invitation to a meeting to be held on 22 February 2005 on the ground that the meeting was premature, would be unproductive and could have an adverse impact on the demarcation process, as a result of which the Commission was obliged to cancel the meeting (February 2005); failing again to meet its financial obligations (May 2006 to the present); introducing qualifications to its previously unqualified acceptance of the final and binding quality of the Delimitation Decision (17 May 2006); failing to respond to the Commission's request for assurances of freedom of movement and security for its staff travelling to the region to reopen the Commission's Field Offices (July to August 2006); and failing to respond to the Commission's invitation to a rescheduled meeting on 24 August 2006.

11. After initial cooperation, Eritrea also began to raise obstacles. In October 2003, it informed the Chief Surveyor that it would withdraw its arrangements for the provision of security in the Eastern Sector if the contract then under negotiation for the emplacement of pillars did not cover the entire boundary as determined in the Delimitation Decision; it repeated its position at the meeting of the Commission on 19 November 2003, objecting to the continuance of demarcation in the Eastern Sector unless at the same time the work foreseen in the Western and Central Sector would continue concurrently; it impeded in a number of ways the ability of the United Nations Mission in Ethiopia and Eritrea ("UNMEE") to provide necessary assistance to the Commission's staff in the field; its conduct in October 2005 occasioned a reference in Security Council resolution 1640 to Eritrea's restriction of "all types of UNMEE helicopter flights within Eritrean airspace or coming to Eritrea, effective as of 5 October 2005, and the additional restrictions on UNMEE's freedom of movement imposed since then, which have serious implications for UNMEE's ability to carry out its mandate. . ."; on 6 December 2005, Eritrea sent a letter to UNMEE requesting members of UNMEE who were nationals of the United States of America, Canada and Europe, as well as the Russian Federation, to leave the country within ten days, a measure which occasioned a condemnatory statement by the President of the Security Council. In December 2005, the Security Council was led to relocate military and civilian staff of UNMEE from Eritrea to Ethiopia "solely in the interests of the safety and security of UNMEE staff. The lack of cooperation with UNMEE by the Eritrean authorities has produced conditions on the ground which prevent UNMEE implementing its mandate satisfactorily". (Statement by the President of the Security Council, 14 December 2005). This mandate included the provision of necessary assistance to the Commission's staff on the ground; in the Spring of 2006, Eritrea imposed far-reaching restrictions on UNMEE that had the effect of seriously impeding the resumption of operations by the Commission's field staff; it rejected the Commission's invitation to attend a meeting on 15 June 2006; instead, it sent a letter to the Commission stating that it was not prepared to continue its engagement, implying that the demarcation process was biased in favour of Ethiopia; in July 2006, it refused visas to the Commission's field staff who had been instructed to return to

Eritrea to reopen the Field Office there. Like Ethiopia, Eritrea did not respond to the Commission's request for it to attend a meeting on 24 August 2006. The foregoing course of conduct has, regrettably, also contributed significantly to the present impasse.

12. These difficulties have persisted, notwithstanding that the Commission has held meetings with the Parties on several occasions with a view to securing their agreement to the renewal of the field work in the demarcation process. The most recent meetings of the Commission with the Parties were held on 10 March 2006 and 17 May 2006. The 15 June 2006 meeting was cancelled due to Eritrea's refusal to attend. The Parties were invited to a meeting to have been held on 24 August 2006 and the Parties' replies to the invitation were requested by 10 August. No replies were forthcoming and attempts to contact the Parties by the Registrar of the Commission elicited no responses. In the meantime, the Commission had decided to reopen the Field Offices after obtaining the Parties' agreement at the 10 March 2006 meeting. These offices had been operating with a reduced staff since January 2004 and were eventually closed on 31 March 2005. However, when the Deputy Secretary of the Commission was dispatched to Addis Ababa in early August 2006 with a view to introducing the newly recruited Field Office staff to the local officials, she was unable to gain access to any relevant Ethiopian officials. The Commission had also instructed her to proceed to Eritrea, but she was advised by the Eritrean authorities not to attempt to enter Eritrea. It thus proved impossible to implement the Commission's decision to reopen all the Field Offices or reactivate the demarcation process as originally contemplated.
13. These developments, including the problems confronting the Commission as a result of the attitudes of the Parties, have all been reported to the Secretary-General of the United Nations at three-monthly intervals and have been passed on by him to the Security Council. The Security Council has on no less than fourteen occasions called upon the Parties to meet their obligations but has achieved no more success than the Commission.³
14. The frustration of the demarcation process as originally conceived has continued for nearly four years. There is no present sign that the Parties will change their positions in the reasonably proximate future. The United Nations Security Council by resolution 1710 called on the Parties to "cooperate fully with the EEBC" and "to implement completely and without further delay or preconditions the decision of the EEBC and to take concrete steps to resume the demarcation process". The Security Council specifically demanded that "Eritrea reverse, without further delay or preconditions, all restrictions on UNMEE's movement and operations" and that Ethiopia "accept fully and without delay the final and binding decision of the Eritrea-Ethiopia Boundary Commission and take immediately concrete steps to enable, without preconditions, the Commission to demarcate the border completely and promptly." The Commission, on 6 October 2006, wrote to the Parties asking them what steps they

³ S/RES/1398 (15 March 2002), S/RES/1430 (14 August 2002), S/RES/1466 (14 March 2003), S/RES/1507 (12 September 2003), S/RES/1531 (12 March 2004), S/RES/1560 (14 September 2004), S/RES/1586 (14 March 2005), S/RES/1622 (13 September 2005), S/RES/1640 (23 November 2005), S/RES/1661 (14 March 2006), S/RES/1670 (13 April 2006), S/RES/1678 (15 May 2006), S/RES/1681 (31 May 2006 and S/RES/1710 (29 September 2006).

intended to take to implement the foregoing requests of the Security Council. The Commission asked for replies by 22 October 2006. Eritrea replied on 22 October reiterating the position that it had previously taken to the effect that no progress could be made until Ethiopia stated without qualification that it accepted the boundary as determined by the Commission in its Decision of 13 April 2002. As yet, Ethiopia has not replied to that request. Both Parties declined to attend the meeting of the Commission called for 20 November 2006.

15. The present situation is, therefore, that, in the Eastern Sector, the boundary points for the pillar emplacements have been established but no pillars have been emplaced; in the Central and Western Sectors no pillar site assessment has been conducted and the Parties have not enabled the Commission to meet the deadlines set out in the various schedules of work it has promulgated for those sectors.
16. Up to the time of, and immediately following, the delimitation of the border in April 2002, the Commission approached its mandate to demarcate the boundary as requiring it actually to emplace pillars at the turning points of the boundary. This assumed that the necessary cooperation of the Parties would be forthcoming and that UNMEE would not be prevented from providing essential assistance.
17. The Algiers Agreement, in establishing the Commission, is a constitutional instrument creating an international institution and conferring on it functions and powers. As such, its interpretation must be approached in the same way as international organisations have regularly approached the interpretation of their constituent instruments, that is, by way of the concept of institutional “effectiveness”. Even though the governing text may not explicitly empower the organisation to act in a particular manner, international law authorises, indeed requires, the organisation, should it find it necessary, if it is to discharge all its functions effectively, to interpret its procedures in a constructive manner directed towards achieving the objective the Parties are deemed to have had in mind. The same is true of international judicial organs. (*Territorial Dispute (Libyan Arab Jamahiriya/Chad)* Judgment, *ICJ Reports* 1994, pp. 6, 25 and the cases there cited in support of “one of the fundamental principles of the interpretation of treaties, consistently upheld by international jurisprudence, namely, that of effectiveness. . . .”)
18. In the present case, the manifest objective was to bring the border dispute to an end at the earliest possible date by means of the identification of a boundary established by the prescribed colonial treaties and applicable international law with as much precision as could be achieved in the circumstances and without deciding *ex aequo et bono*.
19. Having carefully surveyed the alternatives now available to the Commission and having studied anew the written and oral presentations made to it by the Parties, the Commission feels obliged to adopt another approach to effect the demarcation of the boundary.
20. Modern techniques of image processing and terrain modelling make it possible, in conjunction with the use of high resolution aerial photography, to demarcate the course of the boundary by

identifying the location of turning points (hereinafter called “boundary points”) by both grid and geographical coordinates with a degree of accuracy that does not differ significantly from pillar site assessment and emplacement undertaken in the field. The Commission has therefore identified by these means the location of points for the emplacement of pillars as a physical manifestation of the boundary on the ground.⁴ Although these techniques have been available for some time, the Commission has not resorted to them because the actual fixing of boundary pillars, if at all possible, was the demarcation method of first choice. However, it is only possible to demarcate a boundary by the fixing of boundary pillars with the full cooperation of both the States concerned. This has been completely lacking in the Central and Western Sectors and to some extent in the Eastern Sector.

21. In these circumstances, the Commission considers that the most practical way in which it can advance performance of its mandate is to provide the Parties with the list of boundary points that the Commission has identified by the techniques just mentioned along the whole length of the boundary. This list represents the locations at which, if the Commission were so enabled by the Parties, it would construct permanent pillars. This list and some explanatory comments are annexed to this Statement which is also accompanied by forty-five maps illustrating the boundary points. It may be noted that the boundary so illustrated does not differ significantly from the boundary identified in the Delimitation Decision. The areas of Tserona and Zalambessa have been clarified, as contemplated in the Delimitation Decision, by determining the environs of those two places and taking into account, insofar as relevant, manifest impracticabilities.
22. As the Commission evidently cannot remain in existence indefinitely, it proposes that the Parties should, over the next twelve months, terminating at the end of November 2007, consider their positions and seek to reach agreement on the emplacement of pillars. If, by the end of that period, the Parties have not by themselves reached the necessary agreement and proceeded significantly to implement it, or have not requested and enabled the Commission to resume its activity, the Commission hereby determines that the boundary will automatically stand as demarcated by the boundary points listed in the Annex hereto and that the mandate of the Commission can then be regarded as fulfilled. Until that time, however, it must be emphasised that the Commission remains in existence and its mandate to demarcate has not been discharged. Until such time as the boundary is finally demarcated, the Delimitation Decision of 13 April 2002 continues as the only valid legal description of the boundary.
23. In adopting this approach, the Commission has been guided by significant authority in State practice, following the use of the word “demarcation” by the United Nations Secretary-

⁴ A comparable, though not identical, situation arose in the *Argentina-Chile Frontier Case* (1966) (38 *International Law Reports* 10), where aerial photography was used to identify points on the boundary. In the Dispositif of the Report of the Tribunal, the boundary was described in part as following the thalweg “of the Encuentro to Point A at the Confluence”. The following is attached to the text at this point: “The location of Point A and subsequent Points is shown on the diagram and air photographs incorporated in this Report. The diagram is not intended as an authoritative map. It is only an index to the air photographs. These photographs are the sole authority for the exact location of the points.” (p. 98).

General and United Nations Security Council when the Iraq-Kuwait border was “demarcated” in 1993.

24. Following Security Council resolution 687 (1991), the United Nations Secretary-General established the Iraq-Kuwait Boundary Demarcation Commission (“the IKBDC”). The terms of reference of the IKBDC were “to demarcate in geographical coordinates of latitude and longitude” the international boundary:

“The coordinates established by the [IKBDC] Commission will constitute the final demarcation of the international boundary The demarcation of the boundary between Iraq and Kuwait will be accomplished by drawing upon appropriate material, including the map transmitted by Security Council document S/22412, and by utilizing appropriate technology.” (Emphasis supplied.)⁵

25. The Security Council expressed support for the Secretary-General’s report.⁶ No doubt was expressed as to the legal acceptability of a “demarcation” by means of a list of coordinates. Although arrangements for the physical representation of the boundary were also made, this physical representation did not replace the demarcation in the form of geographic coordinates but simply represented it on the ground. In its Final Report, the IKBDC stated:

*“. . . [It] has simply carried out the technical task necessary to demarcate for the first time the precise coordinates of the international boundary reaffirmed in the 1963 Agreed Minutes. To this end, the coordinates established by the Commission, as reproduced in Section XIII below, constitute the final demarcation of the international boundary between Iraq and Kuwait.”*⁷

26. Moreover, the feasibility and acceptability of the use of coordinates alone as a means of identifying international boundaries is clearly affirmed by the manner in which the United Nations Convention on the Law of the Sea deals with the limits of maritime claims by States.
27. The fact that the present Commission began its demarcation activity in terms of the location and construction of fixed pillars does not mean that it is precluded from following another course when confronted by the lack of necessary cooperation by the Parties, nor, in the circumstances described, do the Commission’s Rules of Procedure, Demarcation Directions and Demarcation Instructions, originally adopted on the assumption of full cooperation of both

⁵ U.N. doc. S/22558, Report of the Secretary-General regarding paragraph 3 of Security Council resolution 687 (1991), paras. 3-4, 2 May 1991.

⁶ Final Report on the Demarcation of the International Boundary between the Republic of Iraq and the State of Kuwait by the United Nations Iraq-Kuwait Boundary Demarcation Commission, S/25811, para. 13; also reproduced in 94 *International Law Reports* 1.

⁷ *Ibid.*, para. 112.

Parties, remain controlling. To the extent of any incompatibility between those procedural texts and the approach now to be adopted, the latter will prevail.

28. During the coming twelve months, the Commission will remain willing to provide assistance in emplacing the boundary pillars if the Parties jointly so request and provide assurances of cooperation and security.

(Signed) Sir Elihu **Lauterpacht** CBE QC
President of the Commission
27 November 2006